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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 925, Miscellaneous

STEPHEN S. CHANDLER, United States District Judge
for the Western District of Oklahoma,
Petitioner,

VERSUS

TEXACO, INC., a Delaware Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPLICATION FOR IMMEDIATE STAY ORDER

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January ____, 1966

UTTENBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8720

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In the

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OCTOBER TERM, 1965

No. ....., Miscellaneous

STEPHEN S. CHANDLER, United States District Judge
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TEXACO, INC., a Delaware Corporation,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPLICATION FOR IMMEDIATE STAY ORDER

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on December 27, 1965.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals is not reported. It is printed as Exhibit "A" to the Appendix. The Order of the Judicial Council, not yet reported, dated December 13, 1965, filed December 27, 1965, served on Petitioner December 28, 1965, which also prohibited petitioner from pro-

ceeding in the instant case, therefore Companion hereto, is printed as Exhibit "B" to the Appendix. It is now pending in this Court on Petition for Mandamus and/or Prohibition, Numbered 1111 Miscellaneous.

JURISDICTION

The Order of the United States Court of Appeals for the Tenth Circuit was made and filed in that Court on December 27, 1965, and in the United States District Court for the Western District of Oklahoma on December 29, 1965. Although such Opinion sets forth in its caption that this proceeding was on *appeal* from the United States District Court for the Western District of Oklahoma it was *not* on appeal but was an *original action* in the Court of Appeals by Petition for Writ of Mandamus. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the United States District Court was based on diversity of citizenship 28 U.S.C. § 1332(a)(1). The jurisdiction of the Court of Appeals was stated in the Opinion to be under "28 U.S.C. 1651, or under its inherent powers of appellate jurisdiction." The jurisdiction of the Judicial Council was stated in the Order to be pursuant to the power and authority vested in the Judicial Council by the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U.S.C. § 332.

QUESTIONS PRESENTED

1. Where one of the attorneys in a civil case before a United States District Judge also is one of the voluntary members of the Bar who is representing the judge in a civil action brought against him for damages for malicious prosecution by reason of his official acts and the opposing attorney, while voluntarily admitting that the judge is not

biased or prejudiced, moves the judge to disqualify himself under the provisions of 28 U.S.C. § 455 solely by reason of that relationship, and applies to the Court of Appeals for a Writ of Mandamus before the judge can rule on the motion, does a Court of Appeals exceed its authority if it disqualifies the District Judge without giving him the opportunity to first hear and pass on the Disqualification Motion when counsel do not claim bias and prejudice, he has shown no disposition to unduly delay doing so, but on the contrary the record clearly shows that he has advised counsel that he will consider the Application and Brief and rule thereon without undue delay and will proceed no further in the case until he has done so, the proceedings being already stayed by agreed order?

2. Under such state of facts does a Court of Appeals exceed its authority if it disqualifies the judge on the ground "that it has the 'power and inescapable duty,' whether under the all-writs statute, 28 U.S.C. § 1651, or under its inherent powers of appellate jurisdiction, 'to effectuate what seems to us to be the manifest ends of justice' "?

3. Can a Court of Appeals, having no jurisdiction of a Petition for Mandamus or Prohibition seeking to disqualify a trial judge in a case being tried by him, *create* jurisdiction to disqualify that trial judge from further proceeding in the action by the combined use of self-assumed authority of the Judicial Council and self-assumed inherent right to exercise naked power of control, when the ordinary rights of appeal are available to an aggrieved party?

4. Can there be any question of protecting the Court's jurisdiction on appeal when in fact the case is an *ordinary* proceeding and the circumstances surrounding it are usual and ordinary? Can the Appellate Court broaden the All-Writs Statute by an arbitrary classification of the case as "exceptional"?

5. May a Circuit Court arrogate unto itself power which does not otherwise exist by the assumption that it has the right and the authority to combine separate and unrelated powers not themselves sufficient, adequate or applicable?

6. Is the *Judicial Council* of the Tenth Circuit, as such, vested with *judicial* powers and particularly the power to order disqualification of District Judges in *pending* cases?

7. Does 18 U.S.C. § 544 confer *exclusive* jurisdiction upon the judge who is asked to disqualify by virtue of its provision that he shall do so if *"in his opinion"* it would be improper for him to sit on the trial?

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. § 455; 28 U.S.C. § 332; 28 U.S.C. § 1651; 28 U.S.C. §§ 1291 and 1292.

STATEMENT OF THE CASE

On June 8, 1964, Hirschfield, *et al.*, filed a civil case against Texaco, Inc., which under court rule fell by lot on the docket of Judge Chandler.

Eleven months later and on May 10, 1965, after Judge Chandler had spent much time on the case and had made important rulings, some of which were unfavorable to Texaco, Texaco filed an Application requesting that Judge Chandler disqualify himself, as required by 18 U.S.C. § 455, on the ground that John Cantrell, leading counsel for plaintiff, was then representing Judge Chandler in the Court of Appeals where he was *Appellee* in a civil action for damages for malicious prosecution brought against him by O'Bryan, a lawyer, arising out of Judge Chandler's official acts in disbarring O'Bryan for filing a false claim based upon a fabricated contract for attorney's fees of more than a million dollars in a Bankruptcy Reorganization case in which he was sitting, and thereafter, at its request, presenting the evidence to a Grand Jury, which indicted O'Bryan.

The Application for Disqualification charged that Judge Chandler by reason thereof was so related to or connected with Cantrell that it was improper for him to sit in the case, prayed that he disqualify, stay all proceedings pending ruling on the Application and for *the designation by the Chief Judge of the Circuit of another judge* to hear and decide the case.

On May 17, 1965, George W. Jansen, an attorney of Los Angeles, California, urgently requested a conference with the Court and counsel regarding the case and flew to Oklahoma City for a conference on May 19, 1965. Jansen, who had obtained leave to enter the case and participate as counsel for Texaco on April 20, 1965, more than ten months after the case was filed, stated that he had taken over complete control of the case, was now leading counsel,

thus supplanting Phil Daugherty of Oklahoma City, who had theretofore at all times acted as leading counsel for Texaco; that he was responsible for the filing of the Motion to Disqualify. He thereupon demanded that Judge Chandler "without more" disqualify himself.

The record shows that Judge Chandler advised him that the Application stated only a small part of the relevant facts with reference to his relationship with leading counsel for *both* parties and that all of the pertinent facts were necessary in order to determine the question of disqualification; that the Application for Disqualification was completely misleading; that he would consider the Application carefully and study the precedent breaking *Van Dusen* decision from the Third Circuit, cited as sole authority for the claimed disqualification and reach a decision without undue delay.

Upon being further importuned by Jansen to immediately sign the Order of Disqualification, Judge Chandler repeated that he would not act without first carefully considering the Application and the *Van Dusen* decision and supplying all of the relevant facts necessary to disclose his true relationship with counsel; that it was possible that he could supply these undisputed facts which were well known to counsel, by writing a memorandum opinion; that all of the facts should have been included by Jansen in the Application for Disqualification; that the question of *timeliness* and the *propriety* of his Application must be considered since the facts regarding Judge Chandler's relationship with leading counsel for both parties were well known and had been discussed by counsel with their clients in the early stages of the case.

Although Jansen insisted, Judge Chandler refused to sign either an Order of Disqualification, a Stay Order or an Order Refusing to do so, calling Jansen's attention to the fact that the proceeding had theretofore been stayed by agreed Order; that even if no stay order prevented, it would not be proper for him to proceed further in the action until he had ruled on the Application for Disqualification and stated into the record that he *would not* proceed further until he had considered carefully and ruled on the Application to Disqualify which he would do without delay and rule long before the Stay Order expired, and assured Jansen that if the ruling was adverse to Texaco, he would give him time to appeal, if requested, before proceeding further.

Nine days later and on May 28, 1965, on the *same day* that O'Bryan filed his appeal in the Court of Appeals, Jansen obtained leave to file there a Petition for Mandamus seeking to disqualify Judge Chandler and obtained from Judge Pickett an Order staying all proceedings in the case and a Show Cause Order against Judge Chandler.

Jansen had applied for the Writ and Stay Order without awaiting ruling on the Application to Disqualify and Judge Pickett had granted leave to file and entered the Stay Order *ex parte*. Mr. Cantrell, attorney for the plaintiff, *the interested party*, was not served.

Judge Chandler, the *nominal* Respondent, was served and filed timely Motion to Dismiss on June 21, 1965, stating the facts showing lack of jurisdiction and asked dismissal. In the *alternative* he offered to hear and rule on the Application to Dismiss on June 28, 1965, at 9:00 a.m., without

further notice if the Court would lift the Stay Order for that purpose. Neither Texaco nor the Court accepted the offer.

The matter was set for oral argument in Denver on August 18, 1965. Judge Chandler obtained *personal* counsel, who appeared and presented the matter. Decision was not forthcoming until December 27, 1965, more than four months later when an Opinion was filed prohibiting him from proceeding further in the action and directing "that all further proceedings in that case be heard and determined by a judge to be designated by the Chief Judge of the United States Court of Appeals for the Tenth Circuit" rather than under District Court rule as provided by law.

On the *same date* there was filed in the office of the Clerk of the Court of Appeals for the Tenth Circuit and on December 28, 1965, in the Office of the Clerk of the United States District Court for the Western District of Oklahoma and served on Judge Chandler the following:

"IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES

"SPECIAL SESSION—DECEMBER, 1965

"IN THE MATTER OF THE HONORABLE)
STEPHEN S. CHANDLER, UNITED)
STATES DISTRICT JUDGE FOR THE)
WESTERN DISTRICT OF OKLAHOMA)

"ORDER

"* * * it is ORDERED that until the further order of the Judicial Council, the Honorable Stephen S. Chandler *shall take no action whatsoever in any case* or proceeding now or hereafter pending in the United

> States District Court for the Western District of Oklahoma; *that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court;* and that until the further order of the Judicial Council no *cases or proceedings* filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for *any action whatsoever.*" (Italics supplied.)

This blanket Order of the Council, of course, included the Texaco case, *thus doubly prohibiting* Judge Chandler from proceeding further in the case. That Order is pending in this Court on Petition for Writ of Prohibition and/or Mandamus: Stephen S. Chandler, United States District Judge for the Western District of Oklahoma, Petitioner, *versus* Judicial Council of the Tenth Circuit of the United States, Respondent, filed January 6, 1966, Numbered 1111 Miscellaneous.

The statement on page 3 of the Texaco Opinion of the Court of Appeals that,

> "After the Texaco case was at issue, there were *numerous and lengthy hearings on the question of disqualification,* and other matters, relating to the case. Judge Chandler repeatedly stated that he did not intend to try the case, but *refused* to disqualify himself and assign it to another judge."

is completely erroneous. The Record shows *affirmatively* and *clearly* that there was no hearing on the Application for Disqualification, only the "urgent" conference requested by Mr. Jansen, *ante.* The Record also shows *affirmatively* and *clearly* that Judge Chandler never at any time *refused* to disqualify. The exact opposite is disclosed by the Record.

The evidence would have shown, if Judge Chandler had been *permitted* to hear and rule on the Application for Disqualification, that at the first hearing in the case on July 2, 1964, Judge Chandler suggested to counsel that he would like to transfer the case to one of his associates since his docket was quite heavy because of the prolonged illness of one of his associates; that both Cantrell and Daugherty communicated this suggestion and the facts regarding the relationship between *each* of them and Judge Chandler to their respective clients and thereafter after consultation, advised Judge Chandler that they, as well as their clients, wished him to retain the case; that during January 1965, after Judge Chandler had made some important rulings displeasing to Texaco and after Texaco's attorneys had learned of the *Van Dusen* decision, Cantrell advised Daugherty again that he would join him in asking Judge Chandler to assign the case to another judge, but that it would not be fair to the judge to permit him to spend more time on the case nor fair to his client to delay the case by making such a request later; that unless Daugherty wished to have the case transferred then, he would object if he later requested it; that Daugherty advised him that he had *again* discussed the matter with Texaco officials and they did *not* want Judge Chandler to assign the case to another judge; that the judge was so advised and agreed to proceed with the case until it was ready for trial.

That Cantrell, leading counsel for plaintiff, and Daugherty, leading counsel for Texaco, were lawyers of the highest standing in the profession, were held in high esteem by Judge Chandler, who had practiced at the Bar with them

for twenty-one years and they had often appeared in his court during the twenty-two years he had been on the Bench.

That both Cantrell and Daugherty respected Judge Chandler as a person and as an able and competent judge of high character as evidenced by their zeal in *both* voluntarily coming to his aid and offering their services when he was personally and maliciously attacked by reason of his official acts by Occidental as well as O'Bryan, as has the writer of this Petition voluntarily come forward in this *strange* case to defend as well as vouch for the high character and ability of Judge Chandler; that there was no question of bias or prejudice or favoritism involved; that both Cantrell and Daugherty were sure of it.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals and Council acted without any vestige of jurisdiction, in entering the unprecedented and unconstitutional orders and judgments which are here for review.

2. The judgment and order violated the statutory rights of the parties to the action, Petitoner's fundamental constitutional rights, and did not meet the requirements of due process.

3. The jurisdiction of Federal Courts which are inferior to the Supreme Court is limited to that conferred by acts of Congress. The Court has held that this grant of jurisdiction should be strictly construed.

4. It is not believed that it was the intention of Congress, when enacting 28 U.S.C. § 332, 28 U.S.C. § 137, and

28 U.S.C. § 372(b), to cede to judicial councils the power to pass on the qualification of United States District Judges.

5. In *Occidental,* apparently because the lack of jurisdiction was so clear, the Court of Appeals *ignored* the statutory grounds and procedure for disqualification provided by 18 U.S.C. § 144 under which Occidental purported to proceed and attempted to bolster the Court decision with an identical Council Order. In *Texaco,* lack of jurisdiction was also clear, and the Court of Appeals *again ignored* the statutory grounds and procedure for disqualification provided by 18 U.S.C. § 455, under which Texaco purported to proceed and quoted both *Ritter* and *Occidental.* In *both cases* the effect of the abandonment by the Court of reliance upon the statutory grounds was that the Court of Appeals disqualified Judge Chandler, *sua sponte.*

ARGUMENT

The Court of Appeals for the Tenth Circuit in *United States* v. *Ritter,* 10 Cir., 273 F.2d 30, 32, *cert. denied* 362 U.S. 950, first laid down its unprecedented "inherent power" rule. It *next* cited *Ritter* as authority for the *Occidental,* 10 Cir., 303 F.2d 55, *cert. denied* 372 U.S. 915, *Reh. denied* 373 U.S. 906, and *then* cited both *Ritter* and *Occidental* as authority for *Texaco* the instant judgment. It would seem that the Circuit Court and Council have snowballed 28 U.S.C. § 332 and its "inherent power" rule beyond the breaking point. We believe the foregoing questions and statements point up this fact so clearly as to justify submission to the Court without extended argument.

We also believe that the vital national importance to the judicial system as a whole is apparent and needs no argument.

Of *transcendent importance, however,* is the fact that in making *factual* determinations not supported by the record below, the Court of Appeals departed so flagrantly from the statutory limit of jurisdiction for Federal appellate tribunals as to invite review on the strength of the Supreme Court's supervisory duties toward inferior courts and the vital question of denial of constitutional due process.

In *Occidental,* in which Judge Chandler was only the *nominal* party defendant, the Court of Appeals and the Judicial Council concluded that Judge Chandler was conducting "closed door hearings, meetings, discussion in Chambers," etc., with its unholy implications, and that he "tried to prevent a court officer from the performance of his official duties," etc., wholly untrue but constituting, if true, as charged by Occidental in its Brief in Opposition to Petition for Certiorari, two felonious crimes against the United States.

The later statement of the Court and/or Council in a *personal letter* to Judge Chandler signed by Judge Pickett in reply to the judge's request for *specific* findings of the facts upon which such conclusions were based, that the writ "*does not cast any reflection upon your integrity or your devotion and dedication to the duties of a federal judge,*" which statement was not included in the Opinion and Order and was not made public and filed in the case, was indeed inadequate *reparation* for the denial of due

process and the glaring news headlines imputing dereliction and dishonor to Judge Chandler caused by the expressed conclusions of the Court and Council in the *filed* Opinion and Order.

The Council may have been "satisfied that the implications" of dereliction which Judge Chandler placed "upon its action are not justified" as stated in the Council's letter signed by Judge Pickett but Judge Chandler and the public were not. It was generally assumed that dereliction was clearly implied if not actually *charged*. The entire judiciary suffered from this unconstitutional assumption of jurisdiction.

If the *Occidental* opinion and Order did "not cast any reflection upon" Judge Chandler's "integrity" and "his devotion and dedication to the duties of a Federal Judge" why is it that the Court of Appeals and Council now cite it in the Council Order of December 13, 1965 (not filed until December 27, 1965), prohibiting Judge Chandler from proceeding further in *any* case, as being evidence of dereliction justifying that precedent breaking unconstitutional Order?

In *Texaco*, the instant case, where *Occidental* is also relied on as authority for the disqualification of Judge Chandler, the opinion of the Court states only half-truth making it appear that Judge Chandler was *actually* so injudicious and imprudent as to *refuse* to disqualify in a twenty-five million dollar case where his *personal* attorney was on one side of the case and a stranger on the other side. Does not such a solemn pronouncement by the Court of Appeals reflect upon his wisdom and his conception of the

proper conduct of a Federal Judge under such circumstances? Does it not arouse suspicion of incompetency and personal interest that might constitute corruption? News media so construed it and said so in blazing headlines and loud voices.

At least the false impression created by the half-truth was not complimentary and the Court of Appeals might well have considered that the facts stated in the opinion might impute dereliction or at least incompetence. Did the Court of Appeals realize that it was not a fact finding body and that even if it had such jurisdiction Judge Chandler had not been accorded due process, guaranteed by the Constitution to all, even to a Federal Judge we don't like?

The Court of Appeals made these gratuitous and false statements both in *Occidental* and *Texaco, sua sponte.* They assumed jurisdiction where there was none and did not even accord Judge Chandler due process.

In *Occidental* the Court and Council as reparation for the irreparable injury to his reputation and to the judiciary as a whole, contended themselves with asserting privately to Judge Chandler that "the order does not cast any reflection upon your integrity or your devotion and dedication to" your duties as judge. (Letter from Judge Pickett, *ante.*) It seems almost unbelievable that the Council actually said that the language of the Order did not mean that Judge Chandler was guilty of wrong doing. In any event such "star chamber" proceedings are a poor substitute for due process.

What reparation will the Court of Appeals and the Judicial Council offer Judge Chandler for his second conviction without due process at the "secret" meeting in Denver on December 13, 1965? Will they presume to write a personal letter again and say he wasn't injured? Or will they be generous now that they have held him up to scorn, now, after the irreparable character assassination has been perpetrated and offer him a hearing before the Council that took that from him dearer than life and thus clear their consciences by claiming to have met the constitutional requirements and guarantees which every judge should not only know but also must zealously safeguard and which they knowingly and deliverately and without jurisdiction denied Judge Chandler.

It is hoped that this Court will see the cumulative destruction that has followed in the wake of the first *Ritter* unconstitutional assumption of power by the Court of Appeals for the Tenth Circuit, power not granted by Congress to Courts of Appeal and Judicial Councils by 28 U.S.C. § 332. Unchecked it made possible *Occidental* and *still unchecked,* growing stronger and more daring, it made possible *Texaco* and its Judicial Council *Companion* Order which permanently prohibited Judge Chandler from proceeding further in 149 *pending* cases long ago *legally* assigned to him by valid, legal, statutory *District Court Order* by virtue of 28 U.S.C. § 137.

Texaco is the only *one* of the 149 where there was a litigant seeking Mandamus. *On its own Motion, as in Occidental,* under the guise of "supervisory" power conferred by 28 U.S.C. § 332, the Judicial Council, an Administrative

body, assumed *judicial* power to issue the Extraordinary Writ of Prohibition in the 149 *pending* cases, over which a duly constituted court had *exclusive* jurisdiction.

These cases were in *various stages* of the *judicial process.* It is exactly as if Judge Chandler had been on the bench trying the cases. He was *actually* engaged in writing memoranda in several of them when served with the Writ, was *in the very process of exercising* that valid, exclusive *judicial* power which he and he alone possessed. Congress vested *Courts of Appeal* with such power, 28 U.S.C. § 1651, *only* in *aid* of its *appellate* jurisdiction.

It should be carefully noted by the Court that *Texaco* is an *original* Mandamus action filed in the Court of Appeals. It is *not* an "Appeal From The United States District Court For the Western District of Oklahoma" *as designated in the caption* of the Opinion of the Court of Appeals (Appendix, Exhibit "A").

More astonishing than this assumption by the Council of power to issue Extraordinary *judicial* Writs, are the reasons assigned by the Council for doing so. The first reason was that the Court of Appeals and Council had disqualified Judge Chandler in *Occidental* and *Texaco* where Writs were issued both by the Court of Appeals and Council without jurisdiction, as here, and facts found which vilified and discredited Judge Chandler, when in fact the records in the trial court show these findings to be false.

The other reasons assigned, the O'Bryan cases and the criminal case, are to Judge Chandler's credit. O'Bryan filed the cases maliciously because of Judge Chandler's *official* action disbarring him. *The public records* of Okla-

homa County *at all times showed clearly* that the maliciously filed *criminal* charges *could not be true* and the State Court so found, completely vindicated Chandler. Is not persecution or sanctions indicated rather than derelictions?

There is no question here of an "incapacitated" judge or an ineffective derelict or corrupt jurist. This brief is counsel's assurance to this Court that Judge Chandler was and is in active, good health and in possession of all his mental faculties, has at all times acted judiciously and zealously to uphold the dignity, honor and highest traditions of his judicial position.

It is also hoped that the Court will understand the necessity for this kind of Petition and argument. Counsel in good faith believes that the importance of the principles involved here demand it. Every Uinted States District Judge is equally involved. Judge Chandler cannot and would not permit me to go to this trouble in order to afford himself the luxury of vindication. It has never occurred to him that he needed vindication. He believes the answer is there for all to see. He is just astonished and wonders when someone with the power is going to see what chip the bug is under and stop the game. He can't, of course. He can only refuse to be intimidated and quietly resist each new assault by legal means. He is not responsible for news media and the acts of others.

Involved here may be Judge Chandler's judicial philosophy expressed in his article in the American Bar Association magazine in February, 1954, where he points out the *insidious* destruction of our judicial system by a very

few judges with the outstretched hand for power to "supervise" other judges; and that such supervision is fraught with dangerous possibilities. It may be that sanctions are being taken. Whether or not Judge Chandler is right in his judicial philosophy, here in America he is entitled to express his views frankly and it appears that he is certainly right in believing that under existing law no "supervision" by one inferior court over another is authorized.

In view of the fact that due process has been so flagrantly denied him in the past it can be understood why Judge Chandler will not submit to any further so-called "supervision" until such time as this Court or Congress defines the existence and limits of such authority.

To say the very least no Court of Appeals or Council should be permitted to assume such extraordinary power if there is any other remedy in the world available. This is well stated by MR. JUSTICE JACKSON in *Ex parte John H. Fahey,* 332 U.S. 258, 91 L.Ed. 2041, 2043, where it is pointed out that the writs issued here are very drastic and "extraordinary," and that such writs have in all cases "the unfortunate consequence of making the Judge a litigant obliged to obtain personal counsel or to leave his defense to one of the litigants before him." Extraordinary remedies are left entirely for *really extraordinary* causes, and this is not one of them.

Texaco did not proceed under 28 U.S.C. § 144 to disqualify Judge Chandler for bias and prejudice. It proceeded under 28 U.S.C. § 455 and admitted no bias or prejudice was involved, relying *solely* on the *Van Dusen* case. *Rapp* v. *Van Dusen,* 350 F.2d 806 (1965). These are the only two statutes Congress has seen fit to enact granting the right

to disqualify a judge. They are to be strictly construed. JUDGE BRATTON said, with reference to Section 144, in *Scott* v. *Beams*, 122 F.2d 777, 778 (C.C.A. 10, 1941):

> "The statute thus extending the privilege of disqualifying a judge is remedial; but, *due to its nature and the opportunity for abuse of the privilege,* strict compliance with its provisions is exacted. Henry v. Speer, 5 Cir., 201 F. 869."

The clear provisions of 28 U.S.C. § 455, state that the judge before whom the action is pending "shall disqualify himself in any case in which he * * * is so related to or connected with any party or his attorney as to render it improper, *in his opinion,* for him to sit on the trial, * * *." Judge Chandler was never given the opportunity to rule on the question of his disqualification. Therefore, the statute was not complied with and Texaco cannot claim the benefit of its provisions.

APPLICATION FOR IMMEDIATE STAY ORDER

In the *Companion* case Judge Chandler elected to come here rather than go to the Council which had denied him due process. Even the offer now filed by the Council in its attempt to prevent the entry of a Stay Order offers him only the opportunity to assume the burden of proving his innocence. That is not due process either.

The Council Order is final. Judge Chandler was permanently removed from the 149 cases. His Petition to this Court for a Writ and Stay Order was his categorical election *not* to agree upon "the assignment of the cases now legally assigned to him "made necessary by" that Order.

This is now the only Court with jurisdiction and if this Court does not grant the immediate Stay prayed for which affects hundreds of litigants who are entitled to proceed with their cases before Judge Chandler it will be too late by the time final judgment is entered.

The plaintiffs in *Texaco* have been delayed by Mr. Jansen's deliberate premature Petition to the Court of Appeals for Mandamus and the Stay Order obtained by him there under the circumstances detailed above.

In this case of *clear lack of jurisdiction* the Court of Appeals for the *Tenth* Circuit has held up its decision since August 18, 1965, when the writer of this Petition for Certiorari orally argued the case in Denver, then believing lack of jurisdiction was so clearly evident that Mr. Jansen's Petition for Mandamus would be dismissed by the Court from the Bench at the conclusion of the hearing and Mr. Jansen *reprimanded* for not disclosing the fact at the time he obtained the Stay Order from Judge Pickett that Judge Chandler had not had an opportunity to pass on the Disqualification Application and had agreed to do so with dispatch, instead of having refused to do so as Judge Pickett must surely have believed to be true, or he would surely not have granted leave to file the Petition and entered the Stay Order *ex parte,* especially if he had been advised that an Agreed Stay Order had already been entered by the Trial Judge.

The plaintiffs in 149 cases, including *Texaco,* are daily being deprived of their rights illegally and the damage has been, and will continue to be irreparable unless an immediate Stay Order is entered to stop this *outrage* to the *entire*

judiciary, the legal profession, the litigants specifically involved, as well as the Legislative Branch of the Government, whose domain it is to define the jurisdiction of inferior courts.

The Stay Order should be granted immediately in both *Texaco and the Companion* case, as *Texaco* is included in the 149 cases therein involved.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari presents timely, urgent and vital questions, the decisions of which will determine the course of the stream of judicial administration in America. The Petition for Certiorari should be granted. The question should be thoroughly briefed and argued to this Court and the power of the intermediate Appellate Courts to control the independence of the trial judiciary should be strictly limited and carefully defined.

Respectfully submitted,

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January ____, 1966

APPENDIX

EXHIBIT "A"

FILED
United States Court of Appeals
Tenth Circuit
DEC 27 1965
Robert B. Cartwright
Clerk

FILED
DEC 29 1965
VERA L. HOWARD
Clerk, U. S. District Court
By Josephine P. Gore
Deputy

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 8216 - NOVEMBER TERM, 1965

TEXACO, INC., A Delaware Corporation,)
)
Petitioner,)
)
Vs.)
)
HONORABLE STEPHEN S. CHANDLER, CHIEF)
JUDGE OF THE UNITED STATES DISTRICT)
COURT FOR THE WESTERN DISTRICT OF)
OKLAHOMA,)
)
Respondent.)

Appeal From The United States District Court
For The Western District of Oklahoma

George W. Jansen, Los Angeles, California, and Phil E. Daugherty, Oklahoma City, Oklahoma, of the Firm of

[APPENDIX]

Ames, Daugherty, Bynum, Black, Ashabranner & Rogers, for Petitioner.

Gus Rinehard, Oklahoma City, Oklahoma, for Respondent.

Before PICKETT, LEWIS, BREITENSTEIN, HILL and SETH, Circuit Judges, PER CURIAM.

In this mandamus action Texaco Inc. prays for an order directing Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, to proceed no further in Hirschfield, et al. v. Texaco, Inc., Civil action No. 64-259, pending in the aforesaid court.

It is alleged that on June 6, 1964, the plaintiffs, Norman Hirschfield, Edward C. Joullian III, and Edward C. Joullian brought the aforesaid action in the United States District Court for the Western District of Oklahoma in which a judgment in the sum of $25,000,000 was sought against the defendant Texaco, Inc. for services rendered; that at the time the action was filed there was pending in the same court an action wherein W. H. Pat O'Bryan sought to recover damages in the sum of $10,000,000 alleged to have been caused by the misconduct of Judge Chandler before a federal grand jury which returned an indictment charging O'Bryan with a felony;[1] that in the damage action alleging Judge Chandler to be guilty of malicious prosecution, libel and slander, he was represented by five attorneys headed by John *M.* Cantrell, an Oklahoma attorney; that Mr. Cantrell was one of the attorneys representing the plaintiffs in the aforesaid Texaco suit; and that

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[1] The O'Bryan action was brought in an Oklahoma State Court. After removal to the United States District Court for the Western District of Oklahoma, it was dismissed on the ground that Judge Chandler was immune from civil liability for the alleged acts of misconduct. The dismissal was affirmed by this court. W. H. Pat O'Bryan v. Chandler, 10 Cir., — F.2d —.

Mr. Cantrell continued to represent Judge Chandler in the O'Bryan case until after perfection of an appeal. Judge Chandler moved to dismiss this petition for a writ of mandamus, and later filed what was designated a "waiver of Oral Argument and Rejoinder." These documents discuss the proceedings in the Texaco case at length, and we treat them as a response.

After the Texaco case was at issue, there were numerous and lengthy hearings on the question of disqualification, and other matters, relating to the case. Judge Chandler repeatedly stated that he did not intend to try the case, but refused to disqualify himself and assign it to another judge. 28 U.S.C. §455 provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

In Rapp v. Van Dusen, 350 F.2d 806, it was held that this statute disqualified a United States District Judge from proceeding in a civil case pending before him where attorneys for one of the parties had represented the judge in a mandamus action brought to compel the judge to transfer a case under 28 U.S.C. §1404(a). The judge in the mandamus action had no personal interest and was only a nominal party. In that case, at p. 812, the court said:

> "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel.

This right is impaired when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation."

In the case at bar, Mr. Cantrell was representing Judge Chandler as a defendant in an action wherein the plaintiff sought a $10,000,000 judgment against the Judge as an individual. Confining our decision to the particular facts of this case, we hold that Judge Chandler's connection with one of the attorneys for the plaintiffs in the Texaco case was sufficient to constitute a connection with a "party or his attorney" within the meaning of Section 455.

The jurisdiction of this court to take action to guarantee a fair and impartial trial is no longer open to question. Upon an adequate showing, this court has held that it has the "power and inescapable duty," whether under the all-writs statute, 28 U.S.C. §1651, or under its inherent powers of appellate jurisdiction, "to effectuate what seems to us to be the manifest ends of justice." United States v. Ritter, 10 Cir., 273 F.2d 30, 32, cert. denied 362 U.S. 950; Occidental Petroleum Corp. v. Chandler, 10 Cir., 303 F.2d 55, cert. denied 372 U.S. 915, Reh. denied 373 U.S. 906.

IT IS THEREFORE ORDERED that the Honorable Stephen S. Chandler, Respondent herein, shall proceed no further in the case of Hirschfield, et al v. Texaco Inc., numbered 64-259 on the Civil Docket of the United States District Court for the Western District of Oklahoma, and that all further proceedings in that case be heard and determined by a judge to be designated by the Chief Judge of the United States Court of Appeals for the Tenth Circuit.

The Clerk of this Court is hereby directed to transmit forthwith a copy of this order to the Clerk of the United States District Court for the Western District of Oklahoma for filing in the aforesaid case, Civil No. 64-259.

EXHIBIT "B"

FILED
DEC 28 1965
VERA L. HOWARD
Clerk, U. S. District Court
By Josephine P. Gore
Deputy

DUPLICATE ORIGINAL

FILED
United States Court of Appeals
Tenth Circuit
DEC 27 1965
Robert B. Cartwright
Clerk

IN THE JUDICIAL COUNCIL OF THE TENTH CIRCUIT
OF THE UNITED STATES

SPECIAL SESSION - DECEMBER, 1965

IN THE MATTER OF THE HONORABLE)
STEPHEN S. CHANDLER, UNITED)
STATES DISTRICT JUDGE FOR THE)
WESTERN DISTRICT OF OKLAHOMA)

ORDER

The Judicial Council of the Tenth Judicial Circuit of the United States met in special session at Denver, Colorado, on December 13, 1965. Council members present were:

Judge John C. Pickett
Judge David T. Lewis
Judge Jean S. Breitenstein
Judge Delmas C. Hill
Judge Oliver Seth

Absent from the meeting was Chief Judge Alfred P. Murrah who did not attend because he had previously dis-

qualified himself from participating in proceedings relating to the Honorable Stephen S. Chandler, United States District Judge for the Western District of Oklahoma.

In the past four years the Judicial Council at many meetings has discussed and considered the business of the United States District Court for the Western District of Oklahoma and has done so with particular regard to the effect thereon of the attitude and conduct of Judge Chandler who, as the Chief Judge of that District, is primarily responsible for the administration of such business. During that period Judge Chandler has been a party defendant in both civil and criminal litigation. One civil case is still pending. Two proceedings have been brought in the United States Court of Appeals for the Tenth Circuit to disqualify him from handling specific litigation. In one instance he was ordered to proceed no further and the other is still pending.

From a review of the entire situation pertaining to Judge Chandler the Judicial Council finds that Judge Chandler is presently unable, or unwilling, to discharge efficiently the duties of his office; that a change must be made in the division of business and the assignment of cases in the Western District of Oklahoma; and that the effective and expeditious administration of the business of the United States District Court for the Western District of Oklahoma requires the orders herein made.

Accordingly, pursuant to the power and authority vested in the Judicial Council by the Act of June 25, 1948, c. 646, § 332, 62 Stat. 902, 28 U.S.C. § 332, it is ORDERED that until the further order of the Judicial Council, the Honorable Stephen S. Chandler shall take no action whatsoever in any case or proceeding now or hereafter pending in the United States District Court for the Western District of Oklahoma; that all cases and proceedings now assigned to or pending before him shall be reassigned to and among the other judges of said court; and that until the

further order of the Judicial Council no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.

It is further ORDERED that in the event the active judges of the United States District Court for the Western District of Oklahoma, including Judge Chandler, cannot agree among themselves upon the division of business and assignment of cases made necessary by this order, the Judicial Council, upon such disagreement being brought to its attention, will act under 28 U.S.C. § 137 and make such division and assignment as it deems proper.

An original copy of this order shall be retained in the records of the Judicial Council. A duplicate original shall be forthwith transmitted to the Clerk of the United States District Court for the Western District of Oklahoma. A copy hereof, properly certified by the secretary of the Judicial Council, shall be sent to the United States Marshal for the Western District of Oklahoma for service by him or his deputy on the Honorable Stephen S. Chandler. The Marshal, or his deputy, making such service shall make and file with the secretary of the Judicial Council a return showing the place and time of such service.

Done by the Judicial Council of the Tenth Circuit at Denver, Colorado, this 13 day of December, 1965.

/s/ John C. Pickett
Circuit Judge
/s/ Jean S. Breitenstein
Circuit Judge
/s/ Delmas C. Hill
Circuit Judge
/s/ Oliver Seth
Circuit Judge

Explanation of Record References.

The record before this Court returned by the Clerk of the Court of Appeals for the Tenth Circuit consists of the following items and record references will be made as indicated.

		Record References
1.	Printed Volume I — Motion for Leave to File Petition; Petition for Mandamus; Memorandum of Points and Authorities in Support of Petition; and Order to Show Cause.	(Vol. I p. ....)
2.	Printed Volume II — Appendix to Petition for Writ of Mandamus.	(Vol. II p. ....)
3.	Printed Volume III — Supplemental Appendix to Petition for Writ of Mandamus.	(Vol. III p. ....)
4.	Typewritten Motion to Dismiss filed by Respondent below, Honorable Stephen S. Chandler.	(Res. Motn. p. ....)
5.	Petitioner's Reply Brief filed by Petitioner below, Texaco Inc.	(Pet. R. Br. p. ....)
6.	Waiver of Oral Argument and Rejoinder filed by Respondent below, Honorable Stephen S. Chandler.	(Res. Rej. p. ....)
7.	Transcript of Proceedings before the United States Court of Appeals for the Tenth Circuit filed with the Clerk thereof, July 14, 1965.	(Tr. C.A. 10 p. ....)
8.	Statement of Petitioner below concerning *Rapp v. Van Dusen* and Companion Cases filed by Petitioner below, Texaco Inc.	(Stmt. Pet. p. ....)
9.	Opinion and Order of the United States Court of Appeals for the Tenth Circuit filed with the Clerk thereof, December 27, 1965. This is printed in the Appendix to the Petition here and reference will be made to such Appendix.	(Pet. App. p. ....)
	The Petition for a Writ of Certiorari here is referred to thusly.	(Pet. p. ....)

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IN THE

Supreme Court of the United States

October Term, 1965
No. 925

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,

Petitioner,

vs.

TEXACO INC., a Delaware Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF FOR RESPONDENT TEXACO INC. IN OPPOSITION.

Questions Presented.

As shown in the Counter-Statement of the Case, *infra*, the questions presented by Petitioner are not properly predicated on the facts in this case. In addition, some of the questions refer to the action of the Judicial Council of the Tenth Circuit of the United States in a proceeding which is not related to this petition and which now appears moot.[1]

[1]On February 10, 1966, the New York Times reported that the Solicitor General has informed the Court that Petitioner in Case, 1, 111 Misc. had agreed not to contest the modified order of the Judicial Council of the Tenth Circuit issued on February 4, 1966.

The questions presented by the decision of the United States Court of Appeals for the Tenth Circuit are:

(1) Whether the failure of Petitioner to disqualify himself, in accordance with the provisions of 28 U.S.C. §455, in an action pending before him involving respondent where counsel for respondent's opponent is contemporaneously representing Petitioner in an action against Petitioner for damages, is a clear abuse of discretion for which mandamus is the appropriate remedy.

(2) Whether the United States Court of Appeals for the Tenth Circuit abused its discretion under the All Writs Act, 28 U.S.C. §1651, in ordering Petitioner to proceed no further in the case involving respondent and that all further proceedings in that case be heard and determined by a judge to be designated by the Chief Judge of the United States Court of Appeals for the Tenth Circuit.[2]

Statutes Involved.

The only statutes involved are 28 U.S.C. §455 and 28 U.S.C. §1651.[3]

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[2]On December 31, 1965 the Tenth Circuit assigned the case below (*Hirschfield, et al. v. Texaco Inc.*) to the Honorable Luther B. Eubanks, United States District Judge for the Western District of Oklahoma.

[3]28 U.S.C. § 455 provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

28 U.S.C. § 1651 provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Counter-Statement of the Case.

On June 6, 1964, a complaint was filed in the United States District Court for the Western District of Oklahoma (*Hirschfield, et al. v. Texaco Inc.*) wherein plaintiffs seek a judgment against respondent Texaco Inc. in the amount of $25,000,000.00 for alleged services rendered. (Vol. II pp. 1-4.) The case was assigned to Petitioner.

On August 14, 1964, Texaco Inc. filed a motion to transfer the case to the United States District Court for the Southern District of Texas, Houston Division. (Vol. II pp. 31-40.) Finally, on October 26, 1964, Petitioner ordered that the motion to transfer be stayed until the pretrial conference. (Vol. II p. 203.) Thereafter, on November 5, 1964, Texaco Inc. renewed its motion for transfer. (Vol. II pp. 99-100.) On December 1, 1964, Petitioner again deferred a decision on the motion to transfer. (Vol. II p. 103.) On January 26, 1965, Texaco Inc. again renewed the motion to transfer. (Vol. II pp. 104-107.) For the third time, on March 1, 1965, Petitioner ruled that the motion to transfer would not be heard until final pretrial. (Vol. II p. 125.)

On April 23, 1965, after it had taken depositions, (Vol. II pp. 204, 205) Texaco Inc. filed a motion for summary judgment together with a motion to stay all further proceedings pending the hearing and disposition of the motion for summary judgment. (Vol. II p. 126.) After agreement of counsel, on April 30, 1965, Petitioner granted Texaco Inc.'s motion to stay all other proceedings, except the motion for summary judgment. (Vol. II pp. 168, 169.)

In *Hirschfield et al. v. Texaco Inc.*, plaintiff's counsel is John H. Cantrell, Esq., of Oklahoma City, Oklahoma. Mr. Cantrell still is attorney of record for plaintiffs in the *Hirschfield* case. Mr. Cantrell signed all the pleadings and personally appeared at all hearings in the case before Petitioner. (See, for example, Vol. II pp. 4, 26, 29, 41, 58, 61, 102, 120, 124, etc.)

During the time Mr. Cantrell represented plaintiffs in *Hirschfield,* he was also leading counsel representing Petitioner in *W. H. Pat O'Bryan v. Stephen S. Chandler*. The *O'Bryan* case was filed on September 25, 1963 in the District Court of Oklahoma County, State of Oklahoma, and thereafter removed to the United States District Court for the Western District of Oklahoma. In his petition, W. H. Pat O'Bryan alleged two causes of action—one for actual damages in the sum of $5,000,000.00 and the other for punitive damages in the sum of $5,000,000.00.[4]

Proceedings in the *O'Bryan* case were had before Judge Roy W. Harper, Chief Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, who was designated and assigned as the judge to sit on and try the case. Mr. Cantrell, with

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[4]As the Tenth Circuit found (Pet. App. pp. ii-iii), ". . . that at the time the [Hirschfield] action was filed there was pending in the same court an action wherein W. H. Pat O'Bryan sought to recover damages in the sum of $10,000,000 alleged to have been caused by the misconduct of Judge Chandler before a federal grand jury which returned an indictment charging O'Bryan with a felony; that in the damage action alleging Judge Chandler to be guilty of malicious prosecution, libel and slander, he was represented by five attorneys headed by John M. Cantrell, an Oklahoma attorney; that Mr. Cantrell was one of the attorneys representing the plaintiffs in the aforesaid Texaco suit; and that Mr. Cantrell continued to represent Judge Chandler in the O'Bryan case until after perfection of an appeal. . . ." (footnote omitted)

four other attorneys of the Oklahoma State Bar, appeared as counsel for Petitioner. Mr. Cantrell assumed major responsibility for Petitioner's defense in all court hearings.[5] (Vol. I p. 14)

O'Bryan v. Chandler was dismissed by Judge Harper on July 1, 1964. O'Bryan appealed to the United States Court of Appeals for the Tenth Circuit. The designated transcript of record was certified by the Clerk of the District Court on September 2, 1964, filed in the Office of the Clerk of the Court of Appeals on October 2, 1964, and the case was docketed in the Court of Appeals on October 4, 1964. (Vol. I p. 15.) Mr. Cantrell noted his appearance on behalf of Judge Chandler in the appeal and again took a leading role on appeal until the argument which was heard by the Tenth Circuit en banc on the same day as the argument in this case, August 18, 1965. It was not until after Texaco's Petition for writ of mandamus was filed with the Court of Appeals, May 28, 1965, that Mr. Cantrell (on June 6, 1965) withdrew as counsel for Judge Chandler in the appeal in the *O'Bryan* case. The dismissal of the *O'Bryan* case on the grounds that Petitioner was immune from civil liability for the alleged acts of misconduct was affirmed by the Tenth Circuit on November 30, 1965. *O'Bryan v. Chandler,* 352 F. 2d 987 (10th Cir. 1965).

After the complaint was filed in *Hirschfield, et al. v. Texaco,* on several occasions from June 6, 1964 to

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[5]From the beginning, the case of *O'Bryan v. Chandler* received an unusual amount of publicity and its outcome was of more than ordinary importance to the parties and counsel involved. It was characterized by Petitioner of "great importance to the federal judiciary, to the judiciary in the Nation as a whole and to this defendant * * *." (Vol. I, p. 15)

May 5, 1965, Petitioner on his own initiative stated that he would prefer not to try the *Hirschfield* case and would prefer to assign or transfer it to another judge. It was assumed by counsel for respondent that Petitioner would eventually assign or transfer the *Hirschfield* case to another judge for further proceedings and trial. [Affidavit of Phil E. Daugherty, Exhibit A, Pet. R. Br.] The first decision of the Court of Appeals for the Third Circuit construing 28 U.S.C. §455 was not published. [Counsel for respondent later learned that it had been reargued on May 26, 1965. (Stmt. Pet. p. 2.) The first decision was later reiterated *Rapp v. Van Dusen,* 350 F. 2d 806 (3rd Cir. 1965).] Even so, in light of the unpublished decision, on May 5, 1965, counsel for respondent requested, and counsel for the parties conferred with Petitioner, and respondent informally requested that Petitioner disqualify himself as Judge in the *Hirschfield* case. Petitioner declined to make any decision.[6] (Vol. III p. 24, pp. 34-35, Vol. II pp. 179-181.)

Thereafter, on May 10, 1965, Respondent filed a formal application requesting Petitioner to disqualify himself in the *Hirschfield* case under 28 U.S.C. §455 and seeking the appointment, assignment or designation by the Chief Judge of the Court of Appeals of another judge for further proceedings, pursuant to the provisions of 28 U.S.C. §292(b). At the same time, counsel for respondent requested Petitioner to sign an order granting a stay of *all* proceedings (which would

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[6]Petitioner's claim that he had made "important rulings, some of which were unfavorable to Texaco" (Pet. p. 5) is unsupported. Other than to defer rulings for later disposition, the only substantive ruling related to plaintiff's interrogatories and this was disposed of by agreement of the parties. Even the partial stay was by agreement of the parties.

have included a stay of respondent's motion for summary judgment) pending the decision on the application for disqualification. (Vol. II pp. 170-178.) Again, Petitioner declined to act on the pending motions.[7] (Vol. III pp. 5-19.)

On May 19, 1965, at the request of respondent, a formal conference was held before Petitioner. (Vol. III.) All parties appeared and a court reporter was present. After considerable discussion and argument, Petitioner still was unwilling to act either on respondent's request for a stay of all proceedings or on respondent's application to disqualify. (Vol. III.) Thereafter, on May 28, 1965, respondent filed its Motion for Leave to File Petition and its Petition for a Writ of Mandamus ordering and directing Petitioner not to sit on and to proceed no further in *Hirschfield v. Texaco* and that another judge be designated by the Chief Judge of the Court of Appeals pursuant to 28 U.S.C. 292(b). (Vol. I.)

In response to Texaco's petition for a writ of mandamus in the Tenth Circuit, Petitioner filed a motion to dismiss, seeking to have the order granting leave to file a petition for writ of mandamus set aside and the proceedings dismissed, or, in the alternative, that the stay order entered *ex parte* by the Tenth Circuit "be set aside in order that Respondent may hear and rule on Petitioner's Motion for Disqualification at 9:00 A.M., June 28, 1965, without the necessity of further notice to counsel of said hearing." (Res. Motn. p. 13.)

On the day scheduled for a hearing on respondent's petition for a writ of mandamus, Respondent filed in

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[7]Thus, contrary to the impression given by the petition at page 7, the entire proceedings were not stayed.

the Court of Appeals a Waiver of Oral Argument and Rejoinder in which he waived oral argument but sought leave to have a court reporter record the hearing, "In order to provide opportunity for correction of mis-statement, if others there should be, by written statement before final decision." (Res. Rej. p. 1.) The Court of Appeals concluded that, "To permit Judge Chandler at this time to waive oral argument but reserve the right to have a report made of the oral argument on the other side and have it transcribed and permit him, in effect, to reply to it in writing at some later date would be inconsistent with his expressed waiver. It wouldn't be fair to permit that to be done in our judgment." The Court of Appeals reset the case for oral argument at the August, 1965 session of the Court and stated: "* * * if Judge Chandler is so advised, he may withdraw his waiver of oral argument and appear in person or by counsel and present oral argument in response. . . ." (Tr. C.A. 10, pp. 3-4.) Oral argument was heard on August 18, 1965, and Petitioner was represented by Counsel. The decision and order of the Court of Appeals was thereafter filed on December 27, 1965.

ARGUMENT.

Petitioner's Refusal to Disqualify Himself Under the Circumstances Is a Clear Abuse of Discretion for Which Mandamus Will Lie.

The propriety of Petitioner continuing to sit in a case where counsel for plaintiffs is as closely connected to Petitioner, as Mr. Cantrell in representating Judge Chandler in the *O'Bryan* case, *supra,* is not only a matter of statute (28 U.S.C. §455), but also involves the basic and elementary right of a litigant to the appearance of detached impartiality.

Federal and State courts are all in accord with this proposition. As recently stated by the Fifth Circuit in *Pillsbury Co. v. FTC,* decided January 7, 1966, ... F. 2d ....., in vacating an administrative order, the appearance of impartiality is ". . . the sine qua non of American judicial justice . . ."

This proposition is also embodied in Canon 13 of Canons of Judicial Ethics adopted by the American Bar Association which provides:

> "A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person."

Judges have disqualified themselves to preserve impartial judicial appearance, even though they believed they were not required to do so under the law and in spite of their belief that they could render an impartial decision, *e.g., United States v. Quattrone,* 149 F. Supp. 240 (D.D.C. 1957); *United States v. Valenti,* 120 F. Supp. 80 (D.N.J. 1954).

The Third Circuit decision in *Rapp v. Van Dusen,* 350 F. 2d 806 (1965), cited by the Tenth Circuit in the case below clearly reflects the need for the appearance of complete impartiality. The *ratio decidendi* of the *Rapp* case is particularly applicable here. As stated by the Third Circuit (350 F. 2d at 812):

> "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality . . ."

Significantly, in *Rapp* the judge was only a nominal party with absolutely no personal interest in the action, whereas here Petitioner was the defendant in an action seeking a personal judgment. Thus, there was a more compelling reason for Petitioner to disqualify himself and thereby preserve the appearance of detached impartiality. Petitioner's failure to disqualify himself after being informally requested as a result of his existing connection with plaintiff's counsel in the *Hirschfield* case is a clear abuse of discretion. Petitioner's action removed the appearance of detached impartiality from the trial of the *Hirschfield* case and clouded the appearance of fair judicial administration. Petitioner had no vested right to sit in the *Hirschfield* case, and his continued refusal to disqualify himself made action by the Tenth Circuit mandatory to preserve the appearance of fair judicial administration within the Tenth Circuit. Under these circumstances, mandamus is proper to remedy a clear abuse of discretion.[8]

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[8]Petitioner's assertion that respondent is not entitled to protection afforded by Section 455, *supra,* because Petitioner was not given an opportunity to rule on the motion to disqualify (Pet. p. 20) is not only inaccurate but again misses the purpose of Section 455. On three separate occasions, Petitioner was requested to disqualify himself and refused to rule. At the same time, the case was continuing before Petitioner as a result of Petitioner's refusal to completely stay the proceedings.

The Tenth Circuit Did Not Abuse Its Discretion by Reassigning the Hirschfield Case to Another Judge in the Western District of Oklahoma.

There is no serious question that the Tenth Circuit has the power to issue prerogative writs in the aid of its appellate jurisdiction under the provisions of 28 U.S.C. § 1651. In *La Buy v. Howes Leather Co.*, 352 U.S. 249, this Court held (352 U.S. at pp. 254-255):

> ". . . petitioner urges that such action can be reviewed only on appeal and not by writ of mandamus, since by congressional enactment appellate review of a District Court's orders may be had only after a final judgment. The question of naked power has long been settled by this Court. As late as Roche v. Evaporated Milk Association, 1943, 319 U.S. 21, 25, 63 S. Ct. 938, 941, 87 L. Ed. 1185, Mr. Chief Justice Stone reviewed the decisions and, in considering the power of Courts of Appeals to issue writs of mandamus, *the Court held that 'the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court.'* The recodification of the All Writs Act in 1948, which consolidated old §§ 342 and 377 into the present § 1651(a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. [Citation omitted] Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them." (Emphasis added.)

This power extends not only to circumstances where there is a clear abuse of discretion but also in connec-

tion with the "supervisory control of the District Courts by the Court of Appeals [which] is necessary to proper judicial administration in the federal system." *La Buy v. Howes Leather Co., supra,* at pages 259-260. As shown above, petitioner's refusal to disqualify himself under the circumstances presented was a clear abuse of discretion requiring the Tenth Circuit to exercise its discretion under 28 U.S.C. § 1651. Since petitioner had no vested right to try the *Hirschfield* case, the Tenth Circuit clearly acted properly when it reassigned this case to another district judge in the Western District of Oklahoma in order to preserve the appearance of fair judicial administration within the Tenth Circuit.

• This Court has twice refused to grant certiorari to the Court of Appeals for the Tenth Circuit when it, asserting jurisdiction under 28 U.S.C. §1651, or under its inherent power of appellate jurisdiction, over a District Court Judge to proceed no further in an action pending before him. *U.S. v. Ritter,* 273 F. 2d 30, 32, cert. den. 362 U.S. 950, and *Occidental Petroleum Corp. v. Chandler,* 303 F. 2d 55, cert. den. 372 U.S. 915, Reh. den. 373 U.S. 906.

Respondent submits that the importance of the principle of detached, impartial judicial administration is an exceptional circumstance requiring the exercise of the Tenth Circuit's discretionary power to invoke the extraordinary remedies provided by Section 1651, *supra.*

The only other point made by Petitioner to which Respondent considers an answer may be necessary is the statement that Petitioner was never given the opportunity to rule on the question of his disqualification and that Texaco's petition in the Court of Appeals for a Writ of Mandamus was premature (Pet.

pp. 20, 21.)[9] It should be noted that in the *Occidental* case, the petition for a Writ of Mandamus on which the Court of Appeals acted was filed before the judge of the District Court (Petitioner here) had acted to disqualify himself, and in the *Ritter* case the petition for a writ of mandamus on which the Court of Appeals acted was filed after the judge of the District Court failed to act in accordance with the suggestion of the Court of Appeals in a previous decision in the case (257 F. 2d 920) that he "Take appropriate preliminary steps to the end that further proceedings in the case be had before another judge," stating that he did not "intend to follow that suggestion so you can lay that to one side" (273 F. 2d 32). In this case, respondent waited until it became clear that petitioner was either unwilling or unable to render a decision. In short, respondent did not act rashly but it did act timely.

Conclusion.

The Court of Appeals correctly ruled that the Petitioner was disqualified to sit on or try the *Hirschfield* case; that he proceed no further in the case and that all further proceedings in the case be heard and determined by a judge to be designated by the Chief Judge of the Court of Appeals.

The Court of Appeals' ruling does not conflict with any decision of this Court or any Court of Appeals.

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[9]Petitioner makes many statements which are not supported by record references. For example, see the references on p. 10 that Petitioner suggested to counsel that he transfer the *Hirschfield* case to one of his associates and the statements of respondent's counsel, Mr. Daugherty, in answer. Another example are the references to matters relating to the Order of the Judicial Council. Respondent has no knowledge of the record with regard to the Order of the Judicial Council of the Tenth Circuit which, of course is now moot. (*Supra*, p. 1 footnote 1.)

Nor does the Petition raise any important question of federal law or of judicial administration in the federal system warranting review.

Respondent, therefore, respectfully urges that the Petition be denied.

Respectfully submitted,

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Dated: February, 1966.